Supreme Court of the United States

OCTOBER TERM, 1945

No. 484

HELEN C. POFF, as Executrix of the Last Will and Testament of JOHN B. WELSHANS, deceased,

Petitioner,

against

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RAY ROOD ALLEN,
Counsel for Respondent.

(BURLINGHAM, VEEDER, CLARK & HUPPER)

INDEX

CASES CITED

OTHER AUTHORITIES

Supreme Court of the United States

OCTOBER TERM, 1945

No. 484

HELEN C. POFF, as Executrix of the Last Will and Testament of JOHN B. WELSHANS, deceased,

Petitioner,

against

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

This case presents the question whether a recovery can be had under the Federal Employers' Liability Act (45 U. S. C. A. § 51) for the benefit of a dependent cousin of the decedent when decedent left nearer, non-dependent relatives (namely, sister and a nephew). It is conceded that under the statutes of Descent and Distribution of Pennsylvania, where decedent resided and where he was killed, the sisters and nephew were the sole next of kin in the sense that they would take to the exclusion of the cousin (Petitioner's Brief, p. 8).

The opinion of the Circuit Court of Appeals is reported at 150 F. 2nd 902.

POINTS

I. The decision of the Circuit Court of Appeals is in accord with the decisions of this Court; no novel question is presented.

The controversy turns upon the construction to be given to the expression "next of kin dependent upon such employee", for it is for the benefit of such person or persons that the statute gives a recovery where, as in this case, no spouse, children or parents survive.

Petitioner would construe the foregoing words as meaning "the nearest dependent relative" (Petitioner's Brief, p. 8).

Respondent claims that dependency merely conditions the right of the "next of kin" but plays no part in defining the "next of kin"; that the words "next of kin" are to be given their usual "legal" meaning, namely, those entitled to take under the state law. Such is the construction that this Court has put upon the words "next of kin" in the Federal Employers' Liability Act. In *Seaboard Air Line* v. *Kenney*, 240 U. S. 489, this Court said:

> "Plainly the statute contains no definition of who are to constitute the next of kin to whom a right of recovery is granted. But as, speaking generally, under our dual system of government who are next of kin is determined by the legislation of the various States to whose authority that subject is normally committed, it would seem to be clear that the absence of a definition in the act of Congress plainly indicates the purpose of Congress to leave the determination of that question to the state law" (493-4).

Besides stating how the "next of kin" are to be ascertained, the *Seaboard* case states squarely that it is "the next of kin to whom a right of recovery is granted".

Following the *Seaboard* case, the New York Court of Appeals held in *Hiser* v. *Davis*, 234 N. Y. 300, 305, that the meaning of the word "children"—whether it includes illegitimates—likewise depends upon the state law.

The beneficiaries under the Federal Employers' Liability Act are the spouse and certain relatives, not collectively, but in the alternative, in a fixed order of priority. *C. B. & Q. R. R. Co.* v. *Wells-Dickey Trust Co., Adm.*, 275 U. S. 161, 163. The order of priority is determined by relationship. Dependency merely conditions the right of the "next of kin", once it has been determined, under the state law, who are the "next of kin". And failure of a class to establish pecuniary damages does not operate to pass the right to a succeeding class.

Thus, this Court has held that the fact that a widow survided, although she had deserted decedent and apparently could not show dependency or expectation, precluded a recovery for the benefit of decedent's dependent mother. *New Orleans & N. E. R. R. Co.* v. *Harris*, 247 U. S. 367. In *Lindgren* v. *U. S.*, 281 U. S. 38, recovery was denied where the next of kin, a nephew and niece, were not dependent. There was no suggestion that their non-dependency would serve to qualify a more distant relative who might be dependent.

Petitioner argues that recovery under the statute is based upon dependency, and that for this reason if the "next of kin" is not dependent, he in effect should be treated as non-existent, with the right going to the next person in order of relationship, if that relative is depend-

ent; if not, then to the next, etc., until a dependent is reached.

As to this argument, the Circuit Court of Appeals said:

> "The plaintiff relies chiefly upon the well-settled law that recovery by any of the persons named in the statute is limited to the pecuniary loss suffered. *Michigan Central R. Co.* v. *Vreeland*, 227 U. S. 59; *Gulf, Colorado and Santa Fe R. Co.* v. *McGinnis*, 228 U. S. 173. However, the converse by no means follows: i. e. that all who suffer pecuniary loss by the death may recover. So much is certainly not true. No doubt, there would have been an intelligible purpose in so providing, but from Lord Campbell's Act forward that has never been the law" (R. 25).

Had Congress intended that in the absence of spouse, child and parent, the recovery should be for the benefit of dependent relatives, Congress would have so provided, as it did in the later Death on the High Seas Statute, 46 U. S. C. A. § 761. Instead of the words "next of kin", that statute uses the words "dependent relative". Similar words have been used in other death statutes, e.g. those involved in *Cole* v. *Mayne*, 122 Fed. 836, and *Baldwin* v. *Powell*, 294 N. Y. 130, 133.

The cases cited on page 6, petitioner's brief, may be readily distinguished. In *Missouri K. & T. Ry. Co.* v. *Canada*, 130 Okla. 171, 265 Pac. 1045—the authority cited by 25 C. J. Secundum, p. 1112—the decision turned on the fact that married adults were held not to be "children" within the meaning of the Oklahoma statute and, accordingly, the right of action vested in the next of kin, which was held to include a husband under Oklahoma law. In *Pries* v. *Ashland*, 143 Wis. 606, 128 N. W. 281, alien parents were held not to be within the intendment of the statute,

hence the right vested in a sister, since there was no one belonging to a prior class.

Lytle v. *Southern Ry. Co.*, 152 S. C. 161, 171 S. C. 221, cert. den. 290 U. S. 645, turned on the fact that decedent's wife had deserted him without cause and was living in adultery with someone else: the Court considered the woman's status comparable to that of a divorced wife and that she was not a "widow" within the meaning of the statute. *Indianapolis, etc. Co.* v. *Thompson*, 81 Ind. App. 498; 134 N. E. 514, was similar, except that the deserting party was the husband.

McFadden v. *May*, 325 Pa. 145; 189 Atl. 483, involved merely the mechanics of suit. Beneficially, the child was in the first class, whether or not the father had any beneficial right.

Petitioner relies on a statement in 2 *Roberts, Federal Liability of Carriers* (2nd Ed.), Sec. 882, pp. 1729-31. Roberts cites as support for his view, the *Harris* case (*supra*), 247 U. S. 367. But that decision is contrary to Roberts' statement, since this Court held that the fact that a widow survived, although she had deserted her husband and could apparently not show dependency or expectation, precluded a recovery on behalf of a mother who had sustained pecuniary loss.

Almost the precise question was decided adversely to petitioner in *Kelley's* case, 222 Mass. 538. The pertinent statutory words were:

> "next of kin who were wholly or partly dependent upon the earnings of the employee for support."

The fact that deceased left a non-dependent father was held to bar a dependent brother, who would have recovered had the father not survived.

Petitioner relies on *Notti* v. *Great Northern Ry. Co.*, 110 Mont. 464, 104 Pac. (2d) 7. There, the deceased left two adult sons and a dependent mother. Suit was by the administrator and the decision was on demurrer to the complaint. There being no spouse, the sons were in the first class, so that, as against demurrer, the administrator's suit was held to be maintainable, even though the sons could establish only nominal damages.

The dictum that recovery might be had for the mother was based on the passage from *Roberts, Federal Liability of Carriers*, which, as pointed out above, is unsupported by authority, and is contrary to this Court's decision in the *Harris* case (*supra*), 247 U. S. 367.

The correct rule was well stated in *In re Stone*, 173 N. C. 208 (writ dismissed, 245 U. S. 638), where the Court said:

> "The Federal statute [the Employers' Liability Act], therefore, creates three classes, which are separate and distinct from the other. If there is any member of the first class, the other two are excluded. If there is none of the first class, but one or more of the second, then the third class will be excluded. If any member of the last class does not come under the provisions 'dependent upon such employee' * * * then such person is excluded from that class, and if such exclusion should apply to the whole of that class, then there can be no recovery."

Who are the third or last class? Clearly those recognized by the State statute as being the next of kin of the decedent at the time of his death—in the present case the sisters and nephew. Had such next of kin not survived decedent, others—in this case the cousin—would have been the next of kin. But that *possibility* does not result in the inclusion of the cousin in the third class. Since none of the members of the third class was dependent, then, as the *Stone* case holds, "there can be no recovery".

CONCLUSION

The petition for writ of *certiorari* should be denied.

RAY ROOD ALLEN,
Counsel for Respondent.

(BURLINGHAM, VEEDER, CLARK & HUPPER)

New York, N. Y.,
October 25, 1945.